

² The March 31, 2010 preliminary hearing involved Docket Nos. 1,047,653 and 1,047,654. Docket No. 1,047,653 involves the claim for the February 28, 2009 injury. Travelers Indemnity Company was respondent's insurance carrier at the time of the February 28, 2009 injury. Docket No. 1,047,654 involves the September 16, 2009 injury. Accident Fund National Insurance was respondent's insurance carrier at the time of the September 16, 2009 injury. The Order issued by the ALJ from the March 31, 2010 preliminary hearing referenced only Docket No. 1,047,654. The Application for Appeals Board Review listed only Docket No. 1,047,654.

Respondent requests review of the preliminary hearing Order and alleges the ALJ erred in finding that claimant sustained a separate compensable injury on September 16, 2009. Further, respondent alleges that claimant's alleged injuries are a direct and natural consequence of claimant's February 28, 2009 compensable injury.

Claimant argues the ALJ's Order should be affirmed.

The issue is:

- Whether claimant sustained a new work-related injury on September 16, 2009, or, rather, whether claimant's injury was a direct and natural consequence of his February 28, 2009 work-related accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Claimant is employed as a delivery driver for the respondent. Respondent delivers produce to restaurants in the Kansas City metropolitan area and the surrounding region. As part of his job duties, claimant lifts boxes of fruit and vegetables.

Claimant sustained a work-related injury on February 28, 2009, when he slipped and fell on an icy ramp while making a delivery to a customer. Following the accident, claimant described experiencing numbness and pain in his lower back, right leg, shoulder blades, right arm and his head.³ Travelers Indemnity Company insured respondent's liability for workers compensation purposes on that date. Respondent sent claimant to an occupational health clinic as a result of the injuries he sustained. Records of the initial visit to the clinic in early March 2009 note claimant suffered contusions of the cervical spine, the lumbosacral spine, and posterior right shoulder.⁴ Claimant was conservatively treated and released at maximum medical improvement on March 27, 2009, to full unmodified work activity. Thereafter, claimant returned to his regular job responsibilities. Claimant testified he continued to experience pain and that he learned to deal with it.⁵ He testified that in light of his ongoing difficulties respondent allowed him some accommodations

³ P.H. Trans. at 8.

⁴ *Id.*, Cl. Ex. 1.

⁵ *Id.*, at 11.

despite his lack of any formal restrictions.⁶ Claimant testified he was given routes that did not require as much lifting.⁷

Claimant testified that on September 16, 2009, while he was performing his delivery duties he noticed that his pain was “accumulating.”⁸ Claimant testified his pain was accumulating as he was doing his run but as he got to the last delivery and leaned over to lift a 50-pound box of potatoes, his back started locking up.⁹ Claimant indicated that when he returned to respondent’s warehouse he could not move his legs because of the sharp pain in his back.¹⁰ Claimant testified that following the September 16, 2009 incident, he started experiencing symptoms in his left leg that he had not experienced before.¹¹

After reporting the September 16, 2009 accident, respondent directed claimant back to the occupational health clinic. Claimant was diagnosed with recurrent cervical and lumbosacral spine strains.¹² Claimant was treated conservatively and released at maximum medical improvement on October 1, 2009, to full unmodified work activity.

At the request of claimant’s attorney, Dr. Michael J. Poppa examined and evaluated claimant on October 27, 2009. Dr. Poppa opined that claimant’s September 16, 2009 work-related injury was a direct and proximate cause of his resulting work-related injury with residuals involving his cervical spine, thoracic spine and lumbar spine.¹³ Dr. Poppa also recommended further treatment.¹⁴

Dr. James S. Zarr examined and evaluated claimant on December 1, 2009, at the request of respondent and its insurance carrier American Fund National Insurance. Dr. Zarr opined:

⁶ *Id.*, at 9, 10.

⁷ *Id.*

⁸ *Id.*, at 11.

⁹ *Id.*, at 12.

¹⁰ *Id.*, at 16.

¹¹ *Id.*, at 20.

¹² *Id.*, Cl. Ex. 1.

¹³ *Id.*

¹⁴ *Id.*

It does seem that the [claimant's] current neck and low back pain are a direct and probable result of his work related injury of 03/02/09 [sic]. I do feel that his current neck and back injuries are related to the work accident of 03/02/09 [sic]. I do feel that the work injury of 03/02/09 [sic] is the "prevailing factor" in causing the [claimant's] current neck and low back pain condition. I do feel the work injury of 09/16/09 exacerbated the condition.¹⁵

Relying on the Kansas Court of Appeals decision in *Logsdon*,¹⁶ respondent argues that claimant's September 16, 2009 injury was not a separate and distinct injury but, rather, a direct and natural consequence of the February 2009 injury.

In *Logsdon*, the Court held:

When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury¹⁷

The *Logsdon* Court further stated:

Whether an injury is a natural and probable result of previous injuries is generally a fact question.¹⁸

The facts of this case at this juncture of the proceeding can be distinguished from *Logsdon*. In *Logsdon*, two medical experts testified that Logsdon's 2004 injury would not have occurred but for his 1993 work-related injury.

In the instant case, neither Dr. Zarr nor Dr. Poppa opined that the September 16, 2009 injury would not have occurred but for the February 2009 injury. Stated another way, neither Dr. Zarr nor Dr. Poppa opined the September 16, 2009 injury was a direct and natural consequence of the February 2009 injury.

In fact, Dr. Zarr, respondent's own expert, opined that the September 16, 2009 accident exacerbated claimant's condition.

¹⁵ *Id.*

¹⁶ *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, 128 P.3d 430 (2006).

¹⁷ *Id.*, at Syl. ¶ 3.

¹⁸ *Id.*, at Syl. ¶ 1.

In reviewing and considering the record compiled to date, this Board Member finds that the ALJ's Order finding claimant sustained a new and distinct accident on September 16, 2009, is reasonable. As such, this Board Member will not disturb the Order of the ALJ.

CONCLUSION

This Board Member finds and concludes for preliminary hearing purposes that the claimant sustained a new and distinct accident on September 16, 2009.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, it is the finding, decision and order of this Board Member that the April 1, 2010 Order of ALJ Kenneth J. Hursh is affirmed.

IT IS SO ORDERED.

Dated this ____ day of June, 2010.

CAROL L. FOREMAN
BOARD MEMBER

c: Steffanie L. Stracke, Attorney for Claimant
Clifford K. Stubbs, Attorney for Respondent and Accident Fund National Insurance
Katharine M. Collins, Attorney for Respondent and Travelers Indemnity Company
Kenneth J. Hursh, Administrative Law Judge

¹⁹ K.S.A. 44-534a.